DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2880

[Circular No. 2557]

Rights-of-Way Under the Mineral Leasing Act; Procedures for Collection of Reimbursable Costs

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking amends 43 CFR Part 2880 by providing cost reimbursement procedures that are currently contained in 43 CFR Part 2800 and updates them to provide more adequately for recovery by the United States of the costs of processing and monitoring rights-of-way and temporary use permits granted under authority provided by section 28 of the Mineral Leasing Act of 1920, as amended and supplemented.

EFFECTIVE DATE: February 11, 1985.

ADDRESS: Any suggestions or inquiries should be sent to: Director (330), Bureau of Land Management, 1800 C Street NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The proposed rulemaking amending for the second time the procedures for cost recovery for right-of-way grants and temporary use permits granted under the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.) was published in the **Federal Register** on June 25, 1984 (49 FR 25972). During the 60-day comment period, 16 comments were received; 8 from businesses engaged in the oil and gas industry, 5 from Federal agencies, 2 from associations and 1 from an attorney. The comments and the action taken on them are discussed below.

Several of the comments questioned the appropriateness of the costs shown in the fee schedule, with some feeling that they were too high, while others felt that they were not sufficient to cover the costs incurred by the United States. As discussed in the preamble to the proposed rulemaking of June 25, 1984, the costs shown in the fee schedules are based on current average costs incurred in processing right-of-way grant and temporary use permit applications and monitoring those grants by various offices of the Bureau of Land Management. Since these costs are average costs, there are instances where the cost of handling specific applications by the various offices may be higher or lower than those shown in the schedule. The use of current average costs to set a fee schedule is a commonly accepted practice in both the private and public sectors. The Department has further determined that this method results in less administrative expense than accounting for and reporting actual costs for each right-of-way activity. Therefore, no change has been made in the fee schedule in the final rulemaking.

Several of the comments expressed concern that the process in the proposed rulemaking for determining the appropriate category would delay completing the processing of a right-of-way grant or temporary use permit application. The comments stated this delay could be expecially lengthy in those instances where an application is submitted through the mail. The concern was that the procedures provided in the proposed rulemaking would require the authorized officer to review an application and to return it if it was found inadequate because of the failure to submit a sufficient fee. This would add time to the processing of an application. After careful review of the procedures in the proposed rulemaking, the final rulemaking changes those procedures to permit the acceptance of an application for the purpose of determining the category and nonrefundable fee. Once this determination is made, the applicant will be notified of the category determination and the amount of the nonrefundable fee. No action will be taken on processing an application until the nonrefundable fee has been submitted in full. The final rulemaking also provides for refunding any overpayment of the nonrefundable fee submitted with an application.

The Bureau of Land Management continues to urge right-of-way applicants to take advantage of the pre-application activity provided in the existing regulations. Experience has shown that this process saves the applicant/holder and the Bureau time and avoids problems. Applicants who find it impossible to participate in face-to-face pre-application activity may find that they can save time and avoid problems by working out questions over the telephone. These direct communications are invaluable in reducing delays that can result from misunderstanding.

A few of the comments again raised the point that in their view the collection of reimbursable costs and an annual rental is a double charge for the use of the lands covered by an application/grant. The Mineral Leasing Act requires the collection of costs incurred by the United States in processing and monitoring a right-of-way grant or temporary use permit and the collection of an annual rental. The proposed and final rulemakings follow the requirements of the Mineral Leasing Act regarding cost recovery and no change has been made in these provisions by the final rulemaking.

A couple of comments suggested that the value of the lands involved in a specific application should be considered when setting the fee schedule. The fee schedule is based upon the costs incurred by the Bureau of Land Management in processing an application and monitoring a grant. Those costs were based on the average costs of actions by Bureau personnel in carrying out their responsibilities. These costs would be the same for a visit, whether to lands of high or low value. Any difference in the return received by the United States on lands of high or low value is in the annual rental received once a grant or permit has been issued.

A few of the comments again raised the point that there was an inadequate explanation of how the fee schedules were derived. The preamble to the proposed rulemaking contained a discussion of the process the Bureau of Land Management used in arriving at its fee schedules. The schedules are based on the Bureau's experience in handling application/grants over the past few years. The data that are the basis of the fee schedules are available for review. The Bureau will continue to collect data as it processes/monitors right-of-way grants and temporary use permits. Those data will be the basis for any future revisions of the fee schedules if that should prove necessary.

One comment pointed out that the proposed rulemaking did not clearly provide that the category for monitoring would be the same as that for application processing. This comment is well taken and the final rulemaking incorporates language clarifying the point that the category for processing and monitoring will be based on a single determination by the authorized officer.

A couple of comments raised the issue that the descriptions of categories V and VI in the proposed rulemaking made it impossible to distinguish between a category V and category VI application. The final rulemaking changes the description of category VI to remove this ambiguity.

A few of the comments expressed concern that there would be a variance in the determination of the categories because of the differences in judgment of the various authorized officers. Even though individuals can reasonably reach

a different conclusion using the same data, the Bureau of Land Management has provided careful instructions in this area through its Manual an other instructions. Further, and applicant who feels that a category determination is inappropriate may use the appeal procedure provided in the regulations for an administrative review of that decision.

A couple of the comments requested that the final rulemaking give the authorized officer greater authority than was provided in the proposed rulemaking to change the category determination once it has been made. The Bureau of Land Management's experience in processing applications and monitoring grants indicates that there is very small probability for a change in the category determination once it has been made and that small probability does not justify the additional time and expense that would be incurred by all concerned in the effort to obtain a change of categories. Both of the rulemakings provide authority to change the category to Category VI when it is determined that an environmental impact statement is required, because of the high cost of preparing such a document.

One comment suggested that the final rulemaking should provide relief for an activity of marginal value where there would be an adverse economic effect from the collection of reimbursable costs. The Mineral Leasing Act provides only limited authority for waiving the collection of reimbursable costs. In addition, waiving such costs for a project would provide an indirect government subsidy from all the taxpayers to that project, giving it an unfair competitive advantage over those projects that are required to pay such costs. This suggestion was not adopted by the final rulemaking.

A couple of comments raised questions about the category determination for a large project that encompasses rights-of-way for various purposes, i.e., roads, pipelines, communications sites, working sites, etc. If an application is filed for a pipeline right-of-way, that application will be processed under the provisions of 43 CFR Part 2880, Rights-of-Way Under the Mineral Leasing Act.

The other activities are considered "related facilities" and may be consolidated into the application for the pipeline right-of-way, with the category determination being based on the entire package. Any needed ancillary temporary use permits may also be consolidated into this right-of-way application. However, there is nothing in the existing regulations or this final rulemaking that would prevent an applicant from filing several applications for the various parts of a large project and having them treated as separate applications. No change has been made in the final rulemaking as a result of this comment.

The final rulemaking adds a new paragraph (d) which contains the language of paragraph (b) of the temporary final rulemaking that was published in the **Federal Register** on August 3, 1984 (49 FR 31208). This language has been added to continue in effect the provisions of that temporary final rulemaking until such time as a decision is made on the permanent adoption of those provisions. The Department of the Interior is continuing its review of the comments on the temporary final rulemaking and a final decision on its implementation will be issued in the near future.

Editorial and grammatical changes as needed have been made by the final rulemaking.

The principal author of this final rulemaking is Sheldon Weil, Division of Right-of-Way, Bureau of Land Management, assisted by the staff of the Office of Legislation and Regulatory Management, Bureau of Land Management.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The changes made by this final rulemaking will not, when the payments for all right-of-way and temporary use permit applications are considered, substantially increase the payments made by right-of-way applicants/holders for processing and monitoring. The changes made by this final rulemaking make the reimbursement of costs procedures used by the Bureau of Land Management more equitable and will recover for the United States a greater portion of the costs incurred in the processing and monitoring of right-of-way grants and temporary use permits.

The changes made by this final rulemaking will be equally applicable to all entities that make application to the Bureau of Land Management for use of the Federal lands for oil or gas right-of-way grants or temporary use permits for related facilities.

There are no additional information collection requirements in this final rulemaking requiring approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 43 CFR Part 2880

Administrative practice and procedure, Common carriers, Oil and gas industry, Pipelines, Public lands—rights-of-way.

Under the authority of section 28 of the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), Part 2880, Group 2800, Subchapter B, Chapter II of Title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: December 17, 1984.

J. Steven Griles,

Acting Assistant Secretary of the Interior.

§ 2882.1 [Amended]

1. Section 2882.1(c) is amended by removing the citation "§ 2803.1–1" and replacing it with the citation "§ 2883.1–1".

2. Subpart 2883 is amended by revising § 2883.1–1 to read:

§ 2883.1–1 Cost reimbursement.

(a) (1) An applicant for a right-of-way grant or a temporary use permit shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), prior to the United States having incurred such costs. All costs shall be paid before the right-of-way grant or temporary use permit shall be issued under the regulations of this title.

(2) The regulations contained in this subpart do not apply to State or local governments or agencies or instrumentalities thereof where the Federal lands are used for governmental purposes and such lands and resources continue to serve the general public, except as to right-of-way grants or temporary use permits issued to State or local governments or agencies or instrumentalities thereof or a municipal utility or cooperative whose principal source of revenue is derived from charges levied on customers for services rendered that are similar to services rendered by a profit making corporation or business enterprise.

(3) The applicant shall submit with each application a nonrefundable application processing fee in the amount required by a schedule of fees for this purpose contained in paragraph (c) of this section which shall be based on a review of the use of the Federal lands for which the application is made, the resources affected and the complexity and costs to the United States for processing required by an application

for a right-of-way grant and shall be established according to the following general categories:

(i) *Category I.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the data necessary to comply with the National Environmental Policy Act are available in the office of the authorized officer; and no field examination of the lands affected by the application is required;

(ii) *Category II.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the data necessary to comply with the National Environmental Policy Act are available in the office of the authorized officer; and one field examination of the lands affected by the application to verify the existing data is required;

(iii) *Category III.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the data necessary to comply with the National Environmental Policy Act are available in the office of the authorized officer; and two field examinations of the lands affected by the application to verify the data are required;

(iv) *Category IV.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which some original data are required to be gathered to comply with the National Environmental Policy Act; and two or three field examinations of the lands affected by the application are required;

(v) *Category V.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which original data are required to be gathered to comply with the National Environmental Policy Act and evaluation of these data require formation of an interdisciplinary team; and three or more field examinations of the lands affected by the application are required;

(vi) *Category VI.* An application for a right-of-way grant or temporary use permit to authorize a use of Federal lands for which the cost of processing activities will be in excess of $5,000.

(4)(i) The authorized officer may accept an application for the purpose of determining the appropriate category and the nonrefundable application processing fee; however, the authorized officer shall collect the full amount of the nonrefundable application processing fee prior to processing such application. A record of the authorized officer's category determination shall be made and given to the applicant, and the decision is a final decision for purposes of appeal under § 2884.1 of this title. Notwithstanding the pendency of such appeal, an application shall not be processed without payment of the fee determined by the authorized officer, and where such payment is made, the application may be processed and, if proper, the grant or permit issued. The authorized officer shall make any refund directed by the appeal decision. Where the amount of the nonrefundable application processing fee submitted by an applicant exceeds the amount of such fee as determined by the authorized officer, the authorized officer shall refund any excess unless requested in writing by the applicant to apply all or part of any such refund to the grant monitoring fee required by paragraph (b) of this section or to the rental payment for such grant or permit.

(ii) During the processing of an application, the authorized officer may change a category determination to place an application in Category VI at any time that it is determined that the application requires preparation of an environmental impact statement. A record of change in category determination under this paragraph shall be made, and the decision is appealable in the same manner as an original category determination made under paragraph (a)(4)(i) of this section.

(5) (i) An applicant whose application is determined to be in Category VI shall, in addition to the nonrefundable application processing fee, reimburse the United States for the full actual administrative and other costs of processing the application. The nonrefundable application processing fee required under the fee schedule shall be credited toward the total cost reimbursement obligation of such applicant. When such an application is filed, the authorized officer shall estimate the costs expected to be incurred in processing the application, inform the applicant of the estimated amount to be reimbursed and require the applicant to make periodic payments of such estimated reimbursable costs prior to such costs being incurred by the United States.

(ii) If the payments required by paragraph (a)(5)(i) of this section exceed the actual costs to the United States, the authorized officer may adjust the next billing to reflect the overpayment, or make a refund from applicable funds under the authority of 43 U.S.C. 1734. An applicant may not set off or otherwise deduct any debt due to it or any sum claimed to be owed it by the United States without the prior written approval of the authorized officer.

(iii) Prior to issuance of a right-of-way grant or temporary use permit, an applicant subject to paragraph (a)(5)(i) of this section shall pay such additional amounts as are necessary to reimburse the United States for any costs which exceed the payments required by paragraph (a)(5)(i) of this section.

(iv) An applicant subject to paragraph (a)(5)(i) of this section whose application is denied is responsible for costs incurred by the United States in processing the application, and such amounts as have not been paid in accordance with paragraph (a)(5)(i) of this section are due within 30 days of receipt of a bill from the authorized officer giving the amount due.

(v) An applicant subject to paragraph (a)(5)(i) of this section who withdraws an application before a decision is reached is responsible for costs incurred by the United States in processing the application up to the date the authorized officer receives written notice of the withdrawal, and for costs subsequently incurred in terminating the application review process. Such amounts as have not been paid in accordance with paragraph (a)(5)(i) of this section are due within 30 days of receipt of a bill from the authorized officer giving the amount due.

(6) When 2 or more applications for right-of-way grants are filed which the authorized officer determines to be in competition with each other, each applicant shall reimburse the United States as required by paragraph (a)(3) of this section. If reimbursement of actual costs is required under paragraph (a)(5)(i) of this section, each applicant shall be responsible for the costs identifiable with his/her application. Costs that are not readily identifiable with one of the applications, such as costs for portions of an environmental impact statement that relate to all of the applications generally, shall be paid by each of the applicants in equal shares or such other proration as may be agreed to in writing by the applicants and authorized officer prior to the United States incurring such costs.

(7) When, through partnership joint venture or other business arrangement, more than one person partnership, corporation, association or other entity apply together for a right-of-way grant or temporary use permit, each such applicant shall be jointly are severally liable for costs under this section.

(8) When 2 or more noncompeting applications for right-of-way grants are received for what, in the judgment of the authorized officer, is one right-of-way system, all of the applicants shall be jointly and severally liable for costs under this section for the entire system,

subject, however, to the provisions of paragraph (a)(7) of this section.

(b) (1) After issuance of a right-of-way grant or temporary use permit for which a fee was assessed under paragraph (a) of this section, the holder thereof shall, prior to the United States having incurred such costs, reimburse the United States for costs incurred by the United States in monitoring the construction, operation, maintenance and termination of authorized facilities on the right-of-way or permit area, and for protection and rehabilitation of the lands involved. The monitoring cost category shall be the same as that for the application processing category for that project.

(2) The holder shall submit a monitoring cost fee along with the written acceptance of the terms and conditions of the grant or permit pursuant to § 2882.3(1) of this title. The amount of the required fee shall be determined by the schedule of fees described in paragraph (c) of this section. Acceptance of the terms and conditions of the grant or permit shall not be effective unless the required fee is paid.

(3) A holder whose application was determined to be in Category VI for application processing purposes shall reimburse the United States for the actual administrative costs and other costs of monitoring the grant or permit. When such a grant or permit is issued, the authorized officer shall estimate the costs expected to be incurred in monitoring the grant or permit, inform the holder of the estimated amount to be reimbursed and require the holder to make periodic payment of such estimated reimburseable costs prior to such costs being incurred by the United States.

(4) If the payments required by paragraph (b)(3) of this section exceed the actual costs of the United States, the authorized officer may adjust the next billing to reflect the overpayment, or make a refund from applicable funds under the authority of 43 U.S.C. 1734. A holder may not set off or otherwise deduct any debt due to it or any sum claimed to be owed it by the United States without the prior written approval of the authorized officer.

(5) Following termination of a right-of-way grant or temporary use permit, any grantee or permittee that was determined to be in Category VI shall pay such additional amounts as are necessary to reimburse the United States for any costs which exceed the payments required by paragraph (b)(3) of this section.

(c) The schedules of nonrefundable fees are as follows:

(1) For processing an application for a right-of-way and/or temporary use permit:

Category	Fee
I	$125
II	275
III	350
IV	600
V	1,000
VI	[1] 5,000

[1] A minimum of.

(2) For monitoring a right-of-way grant or temporary use permit:

Category	Fee
I	$25
II	50
III	75
IV	150
V	250
VI	[1]

[1] As required.

(d) Reimbursement of costs for application processing and administration of right-of-way grants and temporary use permits pertaining to the Trans-Alaska Pipeline System shall be made by payment of such sums as the Secretary determines to be required to reimburse the Department of the Interior for the actual costs of these services. In processing applications and administering right-of-way grants and temporary use permits relating to the Trans-Alaska Pipeline System, the Department of the Interior shall avoid unnecessary employment of personnel and needless expenditure of funds as determined by the Secretary. Reimbursement of costs shall be made for each quarter ending on the last day of March, June, September and December. On or before the 16th day after the close of each quarter, the authorized officer shall submit to the permittee a written statement of costs incurred during that quarter which are reimbursable.

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